December 2019

Decision in CPLR Article 78 proceedings - Davis, Brenda (2013-08-12)

STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of
BRENDA DAVIS, 86-G-0486,

Petitioner,

-against-

DECISION & JUDGMENT

BRIAN FISCHER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION,

Respondent.

For a Judgment Pursuant to Article 78 of the
Civil Practice Law & Rules of the State of New York.

Index No. 808-13
(RJI No. 01-13-ST4459)

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

Brenda Davis 86-G-0486
Self Represented Petitioner
Taconic Correctional Facility
250 Harris Road
Bedford Hills, New York 10507-2497

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL
Attorney for Respondents
(Colleen D. Galligan, of counsel)
The Capitol
Albany, New York 12224

Hon. Richard M. Platkin, A.J.S.C.

Petitioner Brenda Davis is an inmate at the Taconic Correctional Facility serving an indeterminate sentence of 15 years to Life for her conviction of Murder in the 2nd Degree. She brings this CPLR article 78 proceeding challenging respondent's determination of April 9, 2012, which denied her release to parole and ordered her held for reappearance in 24 months. Respondent opposes the petition through an answer.[1]

The verified petition alleges principally that the Parole Board: (1) failed to properly weigh the required statutory factors in compliance with recent statutory amendments and focused solely on the nature of the instant offense; (2) did not issue a sufficiently detailed decision and instead relied upon "boilerplate" language; (3) effectively resentenced petitioner; and (4) failed to credit petitioner's positive COMPAS risk assessment evaluation as well as other accomplishments.[2]

A. The 2011 Amendments

In 2011, as part of an omnibus budget bill, the State Legislature amended Executive Law § 259-c (4) to require the Parole Board to "establish written procedures for its use in making parole decisions as required by law." These written procedures "shall incorporate risk and needs

[1] Petitioner appealed the challenged determination administratively, but respondent failed to issue its findings and recommendations within the required time frame. As such, petitioner may deem her administrative remedies to have been exhausted and obtain immediate judicial review (*Graham v New York State Div. of Parole*, 269 AD2d 628 [3d Dept 2000], *leave to appeal denied* 95 NY2d 753 [2000]; *see* 9 NYCRR § 8006.4 [c]).

[2] In addition, petitioner alleges that the Board questioned her about non-statutory factors, interjected personal opinions and failed to consider a PSI report that was not provided to her. However, as petitioner did not raise those arguments in her administrative appeal, they are deemed waived and will not be considered here (*Matter of Cruz v Travis*, 273 AD2d 648 [3d Dept 2000]). Further, the instant petition does not raise the argument that she was not provided with a copy of a statement from the prosecutor, an argument made in her administrative appeal.

principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision" (*id.*). Under prior law, the Board was required to adopt guidelines rather than procedures, and those guidelines could include the use of risk assessment instruments (*see* L 2011, ch 62, § 38-b [Part C, Subpart A]).

At part of the same enactment, the State Legislature amended Executive Law § 259-i (2) (c) (A) to consolidate into a single section of law the factors that must be considered by the Parole Board in evaluating requests for discretionary release to parole. In so doing, the Legislature did not alter the factors that must be considered by the Parole Board and, in fact, re-codified the requirement that "the seriousness of the offense" shall be considered by the Parole Board in all cases (*see* L 2011, ch 62, § 38-f-1 [Part C, Subpart A]). Moreover, in amending Executive Law § 259-i (2) (c) (A), the Legislature left unaltered the legal standard governing discretionary parole decisions: whether there is a reasonable probability that the inmate "will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law" (*id.*).

Finally, as pertinent here, the Legislature amended Executive Law § 259-i to replace the term "guidelines" with "procedures", in conformity with the changes made to Executive Law § 259-c (4). Thus, following the 2011 amendments, the Parole Board must render parole decisions "[i]n accordance with the 'procedures adopted pursuant to [Executive Law § 259-c (4)]'" (Executive Law § 259-*i* [2] [a]).

Accordingly, while the 2011 amendments mandate the application of risk and needs principles in order to assist Board members in assessing the rehabilitation of inmates and their likelihood of success if released, nothing in the text of the Legislature's enactment binds the Parole Board to the outcome of the findings of particular risk assessment instruments or otherwise requires the Board to accord any particular weight or effect to such findings. And, as stated previously, nothing in the 2011 amendments changed the legal standard to be applied by the Parole Board or the factors to be considered, both of which continue to mandate consideration of the seriousness of the inmate's offense.

Moreover, the 2011 amendments were adopted against a longstanding and well-developed body of legal precedent governing parole release decisions, particularly those of the Appellate Division, Third Department. These cases teach that the Parole Board "is not required to give equal weight to each statutory factor" (*Matter of Zhang v Travis*, 10 AD3d 828, 829 [3d Dept 2004]) and that the Parole Board is "free to place whatever weight it believed appropriate upon the factors it is required to consider" (*Matter of Patterson v New York State Bd. of Parole*, 202 AD2d 940 [3d Dept 1994]). Nothing in the text or structure of the 2011 amendments evinces any intention of upsetting this settled law.

Thus, while the findings of any risk assessment instruments administered to an inmate must be considered, the Parole Board is not bound by these risk assessment findings or obliged to render a release decision in accordance with such findings, not even on a presumptive basis. The weight, effect and convincing quality of a particular risk assessment determination, like all of the other information put before the Parole Board as part of its review process, necessarily are left to the sound judgment and discretion of the Board's members (*see also* id. § 259-c [4] [written

procedures intended "to assist members . . . in determining which inmates may be released to parole supervision"]; *see also Matter of Zhang*, 10 AD3d at 829; *Patterson*, 202 AD2d at 941). There is no mathematical formula or mechanical test that is to be applied by the Board in rendering release decisions. The findings of any risk assessments simply are one of many factors to be considered in determining whether "there is a reasonable probability that, if [an] inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law" (Executive Law § 259-i [2] [c]). And the seriousness of the inmate's crime, as such term was understood prior to the 2011 amendments, remains a factor that must be considered by the Board in rendering release decisions.

Indeed, this reading of the 2011 amendments is reflected in a memorandum of the Chair of the Board of Parole, Andrea W. Evans, who emphasized that "the standard for assessing the appropriateness for release, as well as the statutory criteria [board members] must consider has not changed through the [2011 amendments]." In her October 5, 2011 memorandum to Board members, the Chair advised as follows:

> As you know, members of the Board have been working with staff of the Department of Corrections and Community Supervision in the development of a transition accountability plan ("TAP"). This instrument which incorporates risk and needs principles, will provide a meaningful measurement of an inmate's rehabilitation. With respect to the practices of the Board, the TAP instrument will replace the inmate status report that you have utilized in the past when assessing the appropriateness of an inmate's release to parole supervision. To this end, members of the Board were afforded training in the use of the TAP instrument where it exists. Accordingly, as we proceed, when staff have prepared a TAP instrument for a parole eligible inmate, you are to use that document when making your parole release decisions. In instances where a

> TAP instrument has not been prepared, you are to continue to utilize the inmate status report. It is also important to note that the Board was afforded training in September 2011 in the usage of the Compas Risk and Needs Assessment tool to understand the interplay between the instrument and the TAP instrument, as well as understanding what each of the risk levels mean.
>
> Please know that the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider has not changed through the aforementioned legislation. . . . Therefore, in your consideration of the statutory criteria set forth in Executive Law § 259-i (2) (c) (A) (i) through (viii), you must ascertain what steps an inmate has taken toward their rehabilitation and the likelihood of their success once released to parole supervision. In this regard, any steps taken by an inmate toward effecting their rehabilitation, in addition to all aspects of their proposed release plan, are to be discussed with the inmate during the course of their interview and considered in your deliberations.

B. The Challenged Determination

In this case, there was no transition accountability plan developed for petitioner, but she was administered a Correctional Offender Management Profiling for Alternative Sentences ("COMPAS") risk assessment instrument, which found her to be a low risk for future felony violence or arrest. This assessment was before the Board, and it was aware that petitioner was considered a low risk for recidivism according to COMPAS.

Additionally, the Parole Board had before it and considered petitioner's pre-sentence report and inmate status report, her substantial record of institutional programming and accomplishments, the fact that she had no disciplinary tickets since 2008 and the sentencing minutes. Further, the Parole Board conducted an in-depth interview with petitioner in which panel members discussed and considered petitioner's letters of support, the steps taken by petitioner towards her rehabilitation and her plans if released. Further, Board members discussed

the details of petitioner's extraordinarily brutal offense, which involved petitioner tying up her victim in a barn, beating the victim repeatedly, and then shoving a broom handle into the victim's vagina so that it "tore her apart inside", thereby causing her death. Thus, petitioner cannot and does not contend that the Parole Board failed to consider all of the factors required by Executive Law § 259-i (2) (c) (*see also Matter of Kalvastinski v Paterson*, 80 AD3d 1065, 1065-1066 [3d Dept 2011] [Board need not "articulate every factor it considered"], *lv denied* 16 NY3d 710).

The agency's determination denying parole recites the following:

> After a careful review of your record, a personal interview, and deliberation, parole is denied. Your institutional accomplishments and release plans are noted. Required statutory factors have been considered, including your risk to the community. This panel remains concerned, however, about the serious, brutal and senseless nature of the instant offense, which when considered with required and relevant factors, leads to the conclusion, that if released at this time, there is a reasonable probability that you would not live and remain at liberty without violation [*sic*] the law, and your release at this time is incompatible with the welfare and safety of the community.

Thus, in denying parole, the agency exercised its broad discretion to accord the serious nature of petitioner's crime of conviction greater weight and emphasis than other, more favorable factors, including the findings of the risk assessment instrument. As articulated previously, the Parole Board "is not required to give equal weight to each statutory factor" (*Matter of Zhang*, 10 AD3d at 829; *Matter of Collado v New York State Div. Of Parole*, 287 AD2d 921, 921 [3d Dept 2001]; *see Matter of Davis v Evans*, 105 AD3d 1305 [3d Dept 2013]), and it was permitted to accord lesser weight to petitioner's record of institutional accomplishments, her efforts at rehabilitation and the findings of the risk assessment instrument and greater weight to "the seriousness of the [instant] offense" (Executive Law § 259-i [2] [c] [A] [vii]; *see Matter of*

sufficiently detailed to inform petitioner of the reasons for the denial of parole" (*Matter of Whitehead v Russi*, 201 AD2d 825, 825-826 [3d Dept 1994]). Petitioner's claim that the denial of parole release amounted to resentencing is without merit. (*Matter of Crews v New York State Executive Department of Parole Appeals Unit*, 281 AD 2d 672 [3d Dept 2001]). And to the extent that petitioner claims her constitutional right to parole has been violated, petitioner has no protected liberty interest in release on parole now that her minimum sentence has been served (*see Matter of Warren v New York State Div. of Parole*, 307 AD2d 493, 493 [3d Dept 2003]; *Matter of Vineski v Travis*, 244 AD2d 737, 738 [3d Dept 1997], *lv denied* 91 NY2d 809 [1998]).

As petitioner has failed to demonstrate that the Parole Board's determination as a whole is irrational or arbitrary, the petition must be denied (*see Matter of Silmon*, 95 NY2d at 476; *Matter of Cox*, 11 AD3d at 767).[1]

This constitutes the Decision & Judgment of the Court. The original Decision & Judgment and the materials submitted by respondent for *in camera* inspection are being returned to counsel for the respondent; and all other papers are being transmitted to the County Clerk. The signing of this Decision & Judgment shall not constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and notice of entry.

[1] The Court has considered petitioner's remaining arguments and claims and finds them all to be without merit.

Albany, New York
August 12, 2013

Richard M. Platkin, A.J.S.C.

Papers Considered:

Verified Petition, sworn to February 6, 2013, with attached exhibits A-K;
Verified Answer, dated May 15, 2013;
Affirmation of Colleen D. Galligan, Esq., dated May 15, 2013, with attached exhibits A-R;
Correspondence of Petitioner, dated May 12, 2013, with attached exhibit.